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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 PATRICK GATHIGI KARANJA,

12 Plaintiff,

13 v.

14 ASSOCIATE WARDEN (NWDC), *et al.*,

15 Defendants.

No. C09-5391 RBL/KLS

ORDER TO AMEND OR TO SHOW
CAUSE

16 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
17 U.S.C. § 636(b)(1), and Local Rules MJR 3 and 4. The case is before the Court for review of the
18 complaint of Patrick Gathigi Karanja. Mr. Karanja is a detainee at the Northwest Detention
19 Center (NWDC), a federal immigration detention facility administered under contract by The
20 GEO Group, Inc.¹

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22 **I. DISCUSSION**

23 The Court “may act on its own initiative to note the inadequacy of a complaint and
24 dismiss it for failure to state a claim” upon which relief may be granted. *Wong v. Bell*, 642 F.2d
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26 ¹See <http://www.thegeogroupinc.com/northamerica.asp?fid=105>; <http://www.ice.gov/pi/dro/facilities/tacoma.htm>.

1 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure, s 1357
2 at 593 (1969)); see also *Sparling v. Hoffman Construction Co. Inc.*, 864 F.2d 635, 638 (9th Cir.
3 1988); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (court may sua sponte
4 invoke Fed. R. Civ. P. 12(b)(6) to dismiss deficient complaint); *Crawford v. Bell*, 599 F.2d 890,
5 893 (9th Cir. 1979).

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7 The Court must give a plaintiff both “notice of its intention to dismiss” and “some
8 opportunity to respond,” however, unless plaintiff “cannot possibly win relief.” *Sparling*, 864
9 F.2d at 638 (quoting *Wong*, 642 F.2d at 362)). Accordingly, while the Court finds that dismissal
10 of Mr. Hopkins’ complaint under Fed. R. Civ. P. 12(b)(6) is proper for the reasons set forth
11 below, the Court is issuing this order to show cause in order to give Mr. Hopkins an opportunity
12 to file a response.

13 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
14 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
15 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
16 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
17 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
18 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
19 to relief above the speculative level, on the assumption that all the allegations in the complaint
20 are true.” See *Bell Atlantic, Corp. v. Twombly*, 540 U.S. 544, 127 S.Ct. 1955, 1965
21 (2007)(citations omitted). In other words, failure to present enough facts to state a claim for
22 relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at
23 1974.
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1 The court must construe the pleading in the light most favorable to plaintiff and resolve
2 all doubts in plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Unless it is
3 absolutely clear that amendment would be futile, however, a pro se litigant must be given the
4 opportunity to amend his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446,
5 1448 (9th Cir. 1987).

6 Plaintiff alleges that "defendants have inter alia denie[d]" him "access to legal materials
7 and subjected [him] to very cruel and harsh treatment at [the] law library." Dkt. 1, p. 1. He
8 alleges that Defendants Cindy Ogden and Jose Monivais assign one computer to four or five
9 detainees in the same hour and they use the "F-word" and intimidate the detainees "threatening
10 [them] with unfounded write-ups which would be used against us in our removal proceedings."
11 *Id.* Plaintiff also alleges that Defendant Ogden went through his floppy disc and deleted a file
12 he was preparing for a lawsuit against her without his permission or consent and his grievances
13 to the facility have not been answered for a month since June 12, 2009.

14 The Court cannot infer from the vague and conclusory statements contained in Plaintiff's
15 complaint that any of the named defendants have violated his constitutional rights.

16 When a pre-trial detainee challenges some aspect of his pretrial detention, the issue to be
17 decided is the detainee's right to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520, 533, 99
18 S.Ct. 1861, 60 L.Ed.2d 447 (1979)("[U]nder the Due Process Clause, a detainee may not be
19 punished prior to an adjudication of guilt in accordance with due process of law."). Such
20 challenges arise under "the 'more protective' " Fourteenth Amendment Due Process Clause,
21 rather than the cruel and unusual punishment clause of the Eighth Amendment. *Jones v. Blanas*,
22 393 F.3d 918, 931 (9th Cir.2004) (quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th
23 Cir.1987)). But cf. *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir .1998) ("Because pretrial
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1 detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the
2 Eighth Amendment, however, we apply the same standards.”).

3 **1. Allegations of Verbal Harassment**

4 Plaintiff alleges that Defendants Ogden and Monivais “always uses the F-Word and
5 intimidates us threatening us with unfounded write ups.” Dkt. 1, p. 1

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7 Allegations of verbal harassment and abuse fail to state a claim cognizable under 42
8 U.S.C. § 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997); *Rutledge v. Arizona*
9 *Bd. Of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), *aff’d sub nom. Kush v. Rutledge*, 460 U.S.
10 719 (1983); *see, e.g., Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135 F.3d
11 1318 (9th Cir. 1998) (disrespectful and assaultive comments by prison guard not enough to
12 implicate 8th Amendment); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (directing
13 vulgar language at prisoner does not state constitutional claim); *Burton v. Livingston*, 791 F.2d
14 87, 99 (8th Cir. 1986) (“mere words, without more, do not invade a federally protected right”);
15 *Ellingburg v. Lucas*, 518 F.2d 1196, 1197 (8th Cir. 1975) (prisoner does not have cause of action
16 under § 1983 for being called obscene name by prison employee); *Batton v. North Carolina*, 501
17 F.Supp. 1173, 1180 (E.D.N.C. 1980) (mere verbal abuse by prison officials does not state claim
18 under § 1983). This is so even if the verbal harassment is racially motivated. *See Hoptowit v.*
19 *Ray*, 682 F.2d 1237, 1252 (9th Cir. 1982) (federal court cannot order guards to refrain from using
20 racial slurs to harass prisoners); *Burton*, 791 F.2d at 101 n.1 (use of racial slurs in prison does not
21 offend Constitution).
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1 Thus Plaintiff's allegations that Defendants Ogden and Monivais used abusive and
2 insulting language against him, although regrettable, does not state a cause of action under
3 Section 1983.²

4 **2. Access to Law Library**

5 Plaintiff also complains that the Defendants denied or limited his access to the law
6 library.

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8 Prisoners, including pretrial detainees, "have a constitutional right of access to the
9 courts," *Bounds v. Smith*, 430 U.S. 817, 821 (1977); accord *Lewis v. Casey*, 518 U.S. 343, 350
10 (1996), grounded, as relevant to prisoners, in the constitutional guarantees of equal protection
11 and due process, see, e.g., *Murray v. Giarattano*, 492 U.S. 1, 11 n. 6 (1989) ("The prisoner's
12 right of access has been described as a consequence of the right to due process of law, and as an
13 aspect of equal protection." (internal citations omitted)); see also *Christopher v. Harbury*, 536
14 U.S. 403, 415 n. 12 (2002) (observing that, in various civil and criminal cases, the Supreme
15 Court has grounded the right of access to the courts in the Privileges and Immunities Clause of
16 Article IV, the Petition Clause of the First Amendment, the Due Process Clauses of the Fifth and
17 Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment).

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19 The Supreme Court explained in *Bounds* that this right "requires prison authorities to
20 assist inmates in the preparation and filing of meaningful legal papers by providing prisoners
21 with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430
22 U.S. at 828. But the Supreme Court has likewise instructed that "Bounds did not create an
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25 ² Here and elsewhere in his complaint, the Court notes that Plaintiff refers to other detainees who are allegedly being
26 harmed by the conduct of Defendants. However, Plaintiff may not pursue a cause of action under 42 § 1983 on
behalf of any other detainee. Plaintiffs are advised that a pro se party may not represent the interests of other
persons. Although a non-attorney may appear pro se on behalf of himself, he has no authority to appear as an
attorney for others. *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); *Johns v. County of
San Diego*, 114 F.3d 874, 876 (9th Cir. 1997).

1 abstract, freestanding right to a law library or legal assistance.” *Lewis*, 518 U.S. at 351, 116
2 S.Ct. 2174, 135 L.Ed.2d 606. Instead, “[t]he right that *Bounds* acknowledged was the (already
3 well-established) right of access to the courts,” *Lewis*, 518 U.S. at 350, 116 S.Ct. 2174, 135
4 L.Ed.2d 606; see also *id.* at 351, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606
5 (“‘[M]eaningful access to the courts is the touchstone.’ ” (quoting *Bounds*, 430 U.S. at 823, 97
6 S.Ct. 1491, 52 L.Ed.2d 72)). The point is to provide prisoners with the tools they “need in order
7 to attack their sentences, directly or collaterally, and in order to challenge the conditions of their
8 confinement.” *Id.* at 355, 518 U.S. 343; see also *Bounds*, 430 U.S. at 825 (stating that the
9 relevant inquiry is whether the inmate has “a reasonably adequate opportunity to present claimed
10 violations of fundamental constitutional rights to the courts”).

12 An inmate alleging a denial of his right of access to the courts must show actual injury,
13 and “an inmate cannot establish relevant actual injury simply by establishing the prison's law
14 library or legal assistance program is subpar in some theoretical sense.” *Lewis v. Casey*, 518
15 U.S. 343, 351 (1996). In the Ninth Circuit, a prisoner alleging that he was denied his
16 constitutional right of access to the courts due to inadequate access to library facilities must show
17 two things: (1) he must demonstrate that his ability to access the library was so limited that it
18 was unreasonable; and (2) he must establish that this limited access caused him actual injury.
19 *Vandelft v. Moses*, 31 F.3d 794, 787 (9th Cir. 1994). An “actual injury” is “ ‘actual prejudice
20 with respect to contemplated or existing litigation, such as the inability to meet a filing deadline
21 or to present a claim.’ ” *Lewis*, 518 U.S. at 348.

24 Thus, Mr. Karanja must allege not only that his ability to access the library was so limited
25 that it was unreasonable, but that he suffered an actual injury; for example, he was unable to
26 meet a court ordered deadline.

1 **3. Filing of Grievance**

2 Plaintiff also complains that a grievance or grievances he filed has not been answered for
3 over a month. Dkt. 1, p. 2. It is not clear from this allegation whether Plaintiff is merely
4 complaining of the delay in the processing of his grievance or whether he is attempting to state a
5 claim against one of the named Defendants.

6 While there is no constitutional right to file prison grievances, retaliation for using an
7 existing grievance procedure may be classified both as retaliation for exercising the right of free
8 speech protected by the first amendment and the right of access to the courts. *See, e.g., Sprouse*
9 *v. Babcock*, 870 F.2d 450, 452 (8th Cir.1989); *Wolfel v. Bates*, 707 F.2d 932, 933 (6th Cir.1983).

10 Thus, and although the NWDC may have an established grievance procedure, allegations
11 that personnel at NWDC either denied or failed to process grievances properly are not cognizable
12 under Section 1983.
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14 If he is claiming a denial of access to courts, Mr. Karanja may state such a claim only if
15 he alleges that an inadequacy in the prison's administrative grievance program hindered him in
16 presenting a non-frivolous claim concerning his conviction or conditions of confinement. *Lewis*
17 *v. Casey*, 116 S. Ct. 2174, 2181 (1996). However, allegations of mere delay in the prison's
18 processing of grievances is not, in of itself, enough to state such a claim. *See, e.g., Hudson v.*
19 *Robinson*, 678 F.2d 462, 466 (3d Cir. 1982) (mere delay in filing papers in court not enough to
20 establish actual injury to court access if papers ultimately filed or accepted and considered by
21 court).
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23 If he is claiming retaliation for filing the grievance, Mr. Karanja must allege (1) that the
24 named defendant or defendants took some adverse action against him because he filed the
25 grievance and that such action chilled Mr. Karanja's exercise of his First Amendment rights, and
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1 that the action did not reasonably advance a legitimate correctional goal. See, e.g., *Resnick v.*
2 *Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir.
3 1994).

4 **4. Naming Warden as Defendant**

5 Plaintiff also names “Associate Warden (NWDC)” as a defendant but includes no
6 allegations as to this defendant. As noted above, a plaintiff must also allege facts showing how
7 each individually named defendant caused or personally participated in causing the harm alleged
8 in the complaint and a defendant cannot be held liable solely on the basis of his supervisory
9 responsibility or position. To state a claim under Section 1983, Mr. Karanja must allege when,
10 where and in what manner the Associate Warden was involved in causing him constitutional
11 harm.
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13 **5. Deletion of Material from Floppy Disc**

14 Plaintiff alleges that Defendant Ogden deleted a file from his floppy disc containing a
15 lawsuit he was preparing against her and that she did so without his permission. Dkt. 1, p. 2. He
16 fails to state, however, how this conduct has deprived him of a right, privilege or immunity
17 secured by the Constitution or laws of the United States. Therefore, Mr. Karanja has failed to
18 state a claim under 42 U.S.C. § 1983.
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20 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff
21 must show cause explaining why this matter should not be dismissed or, alternatively, he may
22 file an amended complaint curing, if possible, the above noted deficiencies. Plaintiff must show
23 cause or file the amended complaint **no later than August 28, 2009**. If Plaintiff files an
24 amended complaint under § 1983, the amended complaint shall consist of a **short and plain**
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1 **statement** showing that he is entitled to relief. Plaintiff shall allege with specificity the
2 following:

- 3 (1) the names of the persons who caused or personally participated in causing the
4 alleged deprivation of his constitutional rights;
5 (2) the dates on which the conduct of each Defendant allegedly took place; and
6 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall
8 attach only those exhibits relevant to the factual allegations contained within the amended
9 complaint.
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11 Plaintiff is further advised that this amended pleading will operate as a complete
12 substitute for (rather than a mere supplement to) the present complaint. Plaintiff shall present his
13 complaint on the form provided by the Court. The amended complaint must be legibly rewritten
14 or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part
15 of the original complaint by reference, and **it must be clearly labeled the “First Amended**
16 **Complaint” and Cause Number C09-5391 RBL/KLS must be written in the caption.**
17 Additionally, Plaintiff must submit a copy of the “First Amended Complaint” for service on each
18 named Defendant.
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20 **Plaintiff is cautioned that if he fails to show cause or amend his complaint by August**
21 **28, 2009, the Court will recommend dismissal of this action as frivolous pursuant to 28**
22 **U.S.C. § 1915 and such dismissal will count as a “strike” under 28 U.S.C. § 1915(g).**


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1 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended
2 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General
3 Order to Plaintiff.
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5 DATED this 5th day of August, 2009.
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8 Karen L. Strombom
9 United States Magistrate Judge
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